Constitutional forum constitutionnel

Critical Reflections on Fraser: *What Equality Are We Seeking?*

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I. Introduction

In this brief comment, I contextualise and complicate the conventional reading of *Fraser v Canada* as a victory for equality seeking groups.[1] Instead, or at least alongside that reading, I want to suggest some other stories about the trajectory of equality in Canada since the *Charter*[2] era began, and about what future doctrinal developments *Fraser* might lead us to predict.

The history of section 15 — as the meticulous work of Jennifer Koshan and Jonnette Watson-Hamilton[3] in this volume and elsewhere clearly shows — is a history of shifting and

* Associate Professor at Osgoode Hall Law School. Thank you to Professor Debra Parkes, Director of the Centre for Feminist Legal Studies at U.B.C. Allard School of Law for the invitation to speak about *Fraser* in a November 2020 online panel entitled "*Fraser v Canada (2020 SCC)*: 20/20 Vision on Equality?", online: <https://allard.ubc.ca/about-us/blog/2020/recording-fraser-v-canada-2020-scc-2020-vision-equality>. November 2020. My thinking was advanced by the work of my wonderful co-panelists whose work is available in this volume. They are all people whose work constantly provides inspiration and insight. All errors are mine.

1 *Fraser v Canada (Attorney General),* 2020 SCC 28 [*Fraser*].

2 *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

3 Here is a small sample of their more recent work: Jonnette Watson Hamilton & Jennifer Koshan, "Equality Rights and Pay Equity: Déjá Vu in the Supreme Court of Canada" (2019) 15:1 JL & Equality 1; Jonnette Watson Hamilton & Jennifer Koshan, "Adverse Impact: The Supreme Court's Approach to Adverse Effects Discrimination Under Section 15 of the *Charter*" 2014 19:2 Rev Const Stud 191; Jonnette Watson Hamilton & Jennifer Koshan, "*Kahkewistahaw First Nation v. Taypotat* — Whither Section 25 of the *Charter*?" 2016 52:2 Const Forum Const 39; Jonnette Watson Hamilton & Jennifer Koshan, "*Kahkewistahaw First Nation v. Taypotat*: An Arbitrary Approach To Discrimination" (2016) 76 SCLR (2d) 219; Jonnette Watson Hamilton & Jennifer Koshan, "The Continual Reinvention of Section 15 of the *Charter*" (2013) 64 UNBLJ 19.

changing doctrines; of complexity, confusion, and struggle over the meaning and scope of constitutional equality. Some themes repeatedly surface and then are again submerged in the Supreme Court's decisions, but clarity has never been a hallmark of this doctrine — in any of its iterations. With this history in mind, I wonder whether *Fraser* serves to take us forward into new futures. In particular, I wonder whether *Fraser* suggests any role for section 15 in addressing the growing gap in Canada between haves and have nots, a gap that has significantly grown in the *Charter* era. Will *Fraser* enable use of section 15 to combat the many areas of criminal justice in which communities of colour and especially Black and Indigenous peoples are disproportionately targeted, tried, convicted, and punished? Unfortunately, clarifying the way that *Fraser* fits into our political economy and our constitutional jurisprudence makes these more progressive futures for section 15 recede.[4]

For feminists in particular, many of whom (including me) engaged in some celebration of *Fraser*, the issue of limits and impacts needs careful consideration. Will this version of section 15 improve outcomes for equality seeking groups? Does *Fraser* work to help women who aren't already pension-earning professionals? Does a case like *Fraser* further universal benefit programs, including childcare programs? How can we think through the ways that *Fraser* will echo not just as a brush-clearing exercise in terms of section 15 doctrine, but as a decision that can meaningfully improve things for the most vulnerable, most economically compromised women in Canada?

I am not suggesting that Canada's failures in respect to diminishing inequality and improving life for the women on the bottom of these various social scales should be laid at the feet of the *Fraser* claimants, nor those who celebrate this victory. That is not my point. But I do think it matters that we recognize the serious limits of this case as a model for improving the financial equality and security of women. More generally we need to carefully assess theories which suggest that there will be a sort of "trickle down" effect — in other words, that successful equality claims by relatively more advantaged groups will ultimately have a positive impact on less advantaged groups. In addition, I think more focus on the broader contexts in which equality victories are won against the state might induce us to pay less attention to the minute details of the ways that the doctrine is set out, and more to the situations in which judges are willing to make the doctrine more capacious versus those in which the route to section 15 victory is cut off.

In this short note, I first address the meaning of equality in the particular factual context of this case: what did the claimants win? I then place that equality into the Canadian socio-economic context, before turning back to the question of section 15 doctrine to ask where the "victory" in *Fraser* might lead in judicial interpretations of both section 15 and section 1.

4 I acknowledge that these futures recede and have always been more distant than others because of section 15 doctrine. My point here is slightly different, more to indicate why *Fraser* might have been an easier call for the Supreme Court, might have at least not posed some of the challenges which might bring down other claims.

II. The Prize Secured: Equality, Depending on your Vantage Point

Fraser involved three retired members of the RCMP challenging the rules which governed their pension contributions while they were working. All three had worked less than full-time when they had young children. They argued for pension contribution parity with other members of the force. The claimants were women working in a largely male workforce, and the Supreme Court upheld the claim on the ground of sex, as described by other authors in this volume. [5]This gave the claimants a level of pension equality with the men they worked alongside with. In doing so, the Court brought some women "up" to the level of their coworkers. This is relatively clear.[6] But what happens when we set *Fraser* into the context of "pension equality" in Canada more generally?

At this juncture in Canada, more women are covered by pension plans than men, a statistic probably attributable to the sectors in which many women work.[7] However, immigrants in general have lower pension coverage.[8] Low income workers also have significantly less pension coverage.[9] My point is that pension equality itself is a goal that can be considered at many different levels of focus: within a particular workplace, profession, or province, along lines of gender, race, or immigration status, *inter alia*. When we look at a particular job, we may see disparities in pension earning around gender and traceable to caregiving or age of first employment for example. But once we zoom out of that particular view, pension disparity also appears based on job categories, unionization, employment sector, and many other factors. The disparities and gaps in pensions earnings and coverage map onto many other forms of inequality and disadvantage. The doctrinal logic of *Fraser* (and broader *Charter* interpretation) only allows arguments in favour of more pension equality in a particular workplace. In doing so it may also exacerbate gaps between, for example, unionized and non-unionized workers, public and private sector workers, or lower and higher income workers. One may think of this as obvious and not an equality issue, but I would argue that it is important to keep in mind in recognizing the clear limits and potential impacts of *Fraser*'s logic.

5 For a fuller description on the facts, readers can turn to other authors in this volume, including: Jonnette Watson-Hamilton, "Cautious Optimism: *Fraser v Canada (Attorney General)"* (2021) 30:2 Const Forum Const 1 at 2; Jennifer Koshan, "Intersections and Roads Untravelled: Sex and Family Status in *Fraser v Canada*" (2021) 30:2 Const Forum Const 29 at 31. The facts are set out by the majority (See *Fraser*, *supra* note 1 at paras 2-32) with the dissent of Justices Brown and Rowe offering some additions at paras 148-162.

6 Here and more generally in my discussion, I am setting aside the debate about how, precisely, gender was engaged on the facts and evidence. This was a significant issue for Justice Côté in dissent.

7 This statistic should not obscure the fact that more women than men live in poverty post-retirement (see Dan Fox & Melissa Moyser, "The Economic Well-Being of Women in Canada" in *Women in Canada: A Gender-based Statistical Report*, 7th ed (Statistics Canada, 2018) or that women's pensions when they have them may be lower than those held by men for reasons including lower wages when working, fewer hours worked, and interruptions in full time work related to childbearing and care work.

8 See "Table 6 Pension coverage by immigration status, age, gender and pension type, 2012" in Marie Drolet & René Morissette, "New facts on pension coverage in Canada" in *Insights on Canadian Society* (Statistics Canada, 2014).

9 See "Table 7: Pension coverage by gender, wage decile and pension type, 2012" and accompanying discussion in Drolet & Morissette, *ibid*.

Even on its own terms, *Fraser* can be seen as having limited impact. The claim in *Fraser* is about a pension scheme for RCMP retirees. It is thus a benefit scheme, but it is fundamentally an *employment* benefit scheme, one subject to the *Charter* by virtue of the fact that the state employs the members of the RCMP. It is not a universal benefit scheme nor a social benefit. In addition, while the full implications about the costs and who will pay them are a bit unclear, it seems very important that the right won in *Fraser* is the right of the women to be able to make pension contributions despite working part time. That is, they are granted the right to use their *own* income to purchase pension coverage.

Parallels can be drawn here, albeit limited ones, with the criticisms that were levelled at *M v H*, a 1999 equality decision of the Supreme Court.[10] *M v H* extended the obligation for spousal support in Ontario family law to same-sex spouses. It is, and was, widely seen as a victory against discrimination for same-sex relationships and LGBTQ+ persons. At the same time, as Brenda Cossman has argued:

> [T]he Court itself placed considerable emphasis on the goal of "reducing the strain on the public purse" by "shifting the financial burden away from the government and on to those partners with the capacity to provide support for dependent spouses." The ruling is consistent with the agenda of fiscal responsibility — of expanding the private support obligations of individual family members, and thereby reducing the demands on the state. It is no coincidence that the very first same sex relationship victory is one that fits within the agenda of fiscal conservatism, the privatization of support obligations, and the demise of the welfare state.[11]

The Court in *Fraser* made no overt comments about the public purse at all. But like *M v H*, *Fraser* does not really involve a claim to public funds or benefits. Like *M v H*, the decision in *Fraser* might actually serve to limit calls on public funds, as the women in *Fraser* would be better off financially post-retirement (just as lower income former spouses in same-sex relationships are better provided for through *M v H* after the breakdown of their relationships). Might claims which would somehow expand access to public benefits, or otherwise involve very significant claims on the public purse, evoke more concern from the Court, leading members of the Court to restrict rather than expand the ambit of section 15? Perhaps Justice Abella would have taken the same position on section 15 regardless of these aspects of the claim. But the arguments raised by the dissent, which are significantly about the slippery slope of section 15 adverse impact claims, illustrate the kinds of arguments which might have carried more weight in a case which was not so peculiarly private, for a public law case.

Arguments about the privatization agenda discernable in "victories" like *M v H* and *Fraser* may lead us back to scholar Nancy Fraser's ideas about recognition versus redistribution in the context of Western approaches to equality.[12] In her work, Fraser has developed arguments illustrating the shift of equality concerns from thoseabout redistribution to concerns about recognition, as the West has become more deeply committed to neoliberal models.

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10 *M v H*, [1999] 2 SCR 3, 171 DLR (4th) 577.

11 Brenda Cossman, "Canadian Same Sex Relationship Recognition Struggles and the Contradictory Nature of Legal Victories" (2000) 48:1 Clev St L Rev 49 at 56 [citations omitted].

12 Nancy Fraser, "From Redistribution to Recognition: Dilemmas of Justice in a 'Post-Socialist' Age" (1995) 212 New Left Rev 68.

Despite the material significance of the claimants' victory, the *Fraser* judgment does not fit easily into the space of "redistribution." It must be at least relevant that the funds themselves, the funds with which the pension coverage will be provided or "bought," are not public funds but the claimants' own earnings.

Let me take a moment to try to clarify. The women of the RCMP matter to me as humans deserving of rights, as Canadians deserving of equality rights, as parents deserving of attention to their care duties, and as women burdened by social expectations and realities in ways most of their male colleagues are not. The point of this commentary is not to label them as the problem, nor to fault the strategizing behind this case. It is to say that it surely must matter for us to recognize that this case, in which Justice Abella has thrown everything at the wall on section 15, is not a case about social benefits and redistribution but about salary and benefits. What is public about this case is public in a very different way than cases challenging, for instance, lack of (access to) housing or medical care. At this particular moment in time, this case does not seem to strike a major blow. Instead, it follows a more market-based and strictly narrow comparative logic in bringing "equality" to the claimants.[13]

III. The Balloon Effect: Shifting the Pressure from Section 15 to Section 1

In addition to the way that changing the scope of our view of *Fraser* may make it look less like a victory, I think this case raises critical questions about the ways that section 1 and section 15 are linked in the structure and doctrine of Canadian *Charter* equality. These thoughts lead me to concerns that the victory in *Fraser* will yield new challenges for future claimants. I have written elsewhere that "equality advocates" need to recognize a line of reasoning in Canadian jurisprudence calling for limits to the scope of section 15. The logic behind these arguments is that a very broad section 15 puts too much pressure on section 1 to "save" the violations lest governments' ability to regulate be strangled by the *Charter*.[14] In *Fraser*, this argument is reflected in the Brown and Rowe JJ (dissenting) suggestion that section 15 is being overloaded by the kind of adverse effect analysis undertaken by the majority in *Fraser*.[15] I would briefly paraphrase this kind of argument as follows: if we are too open at section 15, particularly with respect to adverse effect discrimination, there will be an enormous number of situations in which we can make a finding of discriminatory adverse effects (since that will require only statistical evidence of adverse impact on a group already recognized in the jurisprudence). In the area of race, for instance, a zone in which we have almost no cases, I think we could expect acceptance of statistical evidence of adverse effects would produce many findings of adverse effect discrimination. If all of these cases require remedies, the financial and policy impact will be enormous. Governments will have to make transformational changes in more than one

13 The dissent is highly critical of how comparison plays out in this case, but my point is merely that the basic logic is that workers who move to part time work for childcare reasons should have the same opportunity for contribution as full time workers in the same job.

14 Sonia Lawrence, "Equality and Anti-discrimination: The Relationship between Government Goals and Finding Discrimination in Section 15" in Peter Oliver, Patrick Macklem & Nathalie Des Rosiers, eds, *The Oxford Handbook of the Canadian Constitution* (New York: Oxford University Press, 2017) 815.

15 See, in particular, *Fraser*, *supra* note 1 at paras 206-27 under the heading "Practical Implications" (Brown and Rowe JJ, dissenting).

sector. Courts should not put governments in this position. Therefore, there must be a section 1 solution in these cases.

The implications of a broad interpretation of section 15 have long been part of the discussion in Canada. Before *Andrews*, early thinking about section 15 involved many speculating about where the line would be drawn. Some suggested that the bar could be set very low, perhaps just at differentiation, with all the work to be done in section 1. Peter Hogg, for example, speculated that the threshold for "discrimination" could be quite low, and then the bulk of the "work" would be done at section 1.[16] In response, Richard Moon pointed to the kinds of concerns I raise here:

> [I]f the Canadian courts do adopt the view that section 15 of the *Charter* involves a prohibition of effects discrimination, they will have a difficult time defining the scope of the right and enforcing it in a way that does not undermine their institutional legitimacy.[17]

But in *Andrews*, the first section 15 case decided by the Supreme Court, Justice McIntyre's majority decision chose a more robust section 15 test. Without such a robust test, he wrote, "courts would be obliged to look for and find section 1 justification for most legislation, the alternative being 'anarchy.'"[18] Thus, Justice McIntyre favoured both a robust section 15 test *and* a very deferential application of the *Oakes* test, referencing the way that legislatures must make many distinctions between individuals in order to perform basic functions. However, Justice Wilson, writing for herself, the Chief Justice, Justice L'Heureux-Dubé, and Justice LaForest called for a section 1 test with more bite, and they prevailed on this point:

> Given that s[ection] 15 is designed to protect those groups who suffer social, political and legal disadvantage in our society, the burden resting on government to justify the type of discrimination against such groups is appropriately an onerous one.[19]

Contrary to Peter Hogg's initial suggestion, then, the Supreme Court from the outset has set the bar for discrimination under section 15 quite high. As a result, in most of the cases there is little to see at section 1. Cases either fail at section 15, or they sail through a rather cursory section 1 analysis.[20]

However, there is a small group of cases in which the contour of the tension between section 15 and section 1 is more visible. One of these is a 2002 case, *Lavoie v Canada*,[21] a challenge to a federal civil service rule of preference for citizens in open hiring competitions. The claim ultimately fails. But between the four sets of reasons, some interesting conversations happen. Of most interest for my purposes are the reasons of Justice Arbour who (perhaps surprisingly)

16 Peter W Hogg, *Constitutional Law of Canada*, 2d ed, (Toronto: Carswell, 1985) at 800-01.

17 Richard Moon, "Discrimination and Its Justification: Coping with Equality Rights under the Charter" (1988) 26:4 Osgoode Hall LJ 673 at 679 [citations omitted].

18 *Andrews v Law Society of British Columbia,* [1989] 1 SCR 143 at 180, 56 DLR (4th) 1 [*Andrews*] per Justice McIntyre citing Hugessen JA in *Smith, Kline & French Laboratories v Canada (Attorney General)*, [1987] 2 FC 359 at 367-69, 34 DLR (4th) 584.

19 *Andrews, supra* note 18 at 154 per Justice Wilson (for the majority on this point).

20 Of particular interest, perhaps, since Justice Martin's elevation to the Supreme Court, is the discussion of these cases in Sheilah Martin, "Balancing Individual Rights to Equality and Social Goals" (2001) 80:1/2 Can Bar Rev 299.

21 *Lavoie v Canada*, 2002 SCC 23 [*Lavoie*].

wrote a forceful opinion saying that there was no violation at all. She kept section 15 narrow, refused to find discrimination, and argued that she was moved to do so because of her concern about what would start to happen at section 1.[22] She, like Justice McIntyre in *Andrews*, described a narrower role for section 15 in the name of saving it. Referring to what she called the "perfunctory" or broad approach to section 15, she wrote:

> Under this approach equality rights, once found, will not be at the mercy of a s[ection] 1 analysis that would otherwise, of necessity, be too deferential to the legislative process and hence too heedless of the importance of s[ection] 15(1) rights. Freed of the need to guard the integrity of the legislative process against too-easy findings of s[ection] 15(1) infringements, the justificatory analysis under s[ection] 1 will then be conducted with the uncompromising rigour that I believe it was intended to have. No longer will keeping the legislatures functional necessitate tolerating violations of *Charter* rights, the embodiments of our freedom and of this society's most cherished values, in favour of less valued state objectives such as the one at issue in this case.[23]

Justice Arbour here urges her fellow judges to consider issues *across* the wall between sections 15 and 1, arguing that our equality rights cannot be understood without attention to the realities of governance and the institutional competence of courts versus legislatures. But not even one of her colleagues stood with her on this point.[24]

What is unique about Justice Arbour's reasons in *Lavoie* in particular, is the openness with which the dilemma I concentrate on in this article is expressed. While judges often point to institutional competence issues, they rarely acknowledge the choices they have in terms of how, precisely, to limit their own role. I offer *Lavoie* as an illustration of the dilemma that confronts judges in crafting their opinions in section 15 cases, a dilemma which is produced by the two-step procedure required in Canadian law — first, the discrimination analysis at section 15, and then, should the claimant succeed, the government's chance to justify the violation of section 15 through section 1. The claim can be blocked in many different ways. Some of these ways produce a justified violation, some would mean no violation. More generally, though, *Lavoie* and other cases in which the outcome has been "justified discrimination" — like *NAPE*,[25] *Quebec v A*,[26] and *Centrale des Syndicats*[27] — serve to illustrate that while much section 15 scholarship and strategizing treats section 1 as merely peripheral or irrelevant, the more successful we are at section 15, the less safe this assumption may be.

It may be that section 15 has some unique features that render it more resistant to limitation at section 1, at a conceptual level. The first is that compared to sections 2(a) and 2(b), for example, the test for section 15 is onerous. It sets a high bar, and thus section 1 is rarely called on in section 15 cases. This might be important even if we assume that all of the work that the claimant must do under section 15 doctrine is entirely appropriate (that is, even if we assume that section 1 concerns haven't already been imported into section 15 doctrine). But there may also be a moral mismatch between what discrimination connotes and the idea that we

22 *Ibid* at paras 73-124, especially paras 90-92 per Arbour J.

23 *Ibid* at para 91 (per Arbour J).

24 Only Justice Lebel agreed that there was no violation of section 15, in separate reasons. Justices Gonthier, Iacobucci, Major, and Bastarache found a violation saved by section 1, and Chief Justice McLachlin, Justice L'Heureux-Dubé and Justice Binnie found a violation of section 15 not saved by section 1.

25 *Newfoundland (Treasury Board) v NAPE,* 2004 SCC 66 [*NAPE*].

26 *Quebec (Attorney General) v A,* 2013 SCC 5.

27 *Centrale des syndicats du Québec v Quebec (Attorney General),* 2018 SCC 18 [*Centrale*].

can justify it.[28] Is discrimination against a minority by a democratic majority something particularly odious? Is the idea of justifying that discrimination because it is in fact proportionate to harm the minority for the good of the majority in some particular case, simply too difficult to reconcile with the status of equality as a core *Charter* value? Perhaps we — and judges too, as Justice Arbour's *Lavoie* reasons seem to suggest — appropriately balk at using arguments about a democratic society to justify something once we have labelled it discrimination. One way through that dilemma is just not to build the right so broadly. If institutional competence constraints, or anxieties about anarchy, are going to leave judges feeling "forced" to haul back the potential of section 15 at section 1, why build the right so broadly in the first place? And in fact, section 15 cases denying any right has been infringed are far, far more common than the small number of section 1 justified violations.

Thus, the very success of the claim in *Fraser* must lead us to recognize that there is no particular reason to assume that section 1 will not soon start to play a larger role in our section 15 jurisprudence. Throughout the years in which section 15 claims were repeatedly rejected by the Supreme Court, section 1 considerations tended to recede. The development of a particular jurisprudence about how section 1 ought to apply in the context of section 15 did not happen. But there are reasons to assume that it is precisely cases like *Fraser* which will prompt this response from some judges. Justices Brown and Rowe focus on the immense significance of moving arbitrariness and unfairness considerations into section 1.[29] Justice Côté complains that this is a "green light" to section 1.[30] These are, in my view, amongst the burning straw men described by Justice Abella — but the flames do provide some illumination about how concern regarding an immensely capacious section 15 will probably just shift some battles over to section 1. In *Centrale*, for all the disagreement over how section 15 should operate, former Chief Justice McLachlin was the only one of the full panel who was prepared to hold that the government had not met its burden at section 1.[31] All the others, Justice Abella included, found that section 1 could justify the infringement of section 15.

The relationship of section 1 to section 15 now requires more careful attention from both scholars and litigators — perhaps particularly from those of us who think we are scholars of section 15 and who have argued for a long time that some considerations which we kept finding in section 15 are more appropriately dealt with under section 1. In some ways, this is a consequence of success. The broader section 15 becomes, the more pressure will of course be exerted on and felt by judges to impose section 1 limits.

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28 In many cases the gap between what is protected by section 15 and what is protected by sections 2(a) and 2(b) is can seem very narrow (take for example, *Alberta v Hutterian Brethren of Wilson Colony*, 2009 SCC 37). Recognizing this does not, however, change my general sense that doctrine in these areas has developed, including which cases have been brought and the rhetoric used in decisions, such that there is a deeper and different trepidation about limiting section 15 rights via section 1 than there is about limiting section 2(a) or section 2(b) rights.

29 See *Fraser*, *supra* note 1 at para 223, per Brown and Rowe JJ, dissenting ("The failure to properly define the scope of s 15(1) also has the practical effect of pushing the bulk of the analysis to s.1" [citations omitted]).

30 See *ibid* at para 244, per Côté J, dissenting ("Worse yet, if statistical disparities alone were sufficient, the s. 15(1) analysis would, in effect, be replaced with a green light to s. 1, where the burden is reversed and placed on the government.").

31 *Centrale*, *supra* note 26 per McLachlin CJ at paras 154-59.

IV. Conclusion: Resisting myth making

Fraser, is in some ways, a clear victory for a vision of section 15 which covers adverse impact discrimination. The efforts of the majority to clarify the current test are useful and helpful, if not enough (as many other contributors to this volume have noted) to end the confusion wrought by the Court's many doctrinal restatements (without repudiations) over the years. However, *Fraser* also offers an opportunity to ask what work section 15 is actually doing and what kind of more equal society section 15 might create. These questions are urgent, given the rise in material inequalities in our society since section 15 came into force. I am not suggesting that rights litigation is a causal mechanism in this shift, but rather indicating that we must at least attend to the concurrency of these developments.[32] It is as urgent as ever that we commit to thinking and arguing about the limits of law and litigation at the same time, in the same conversations where we are debating which doctrinal strictures are, are not, and should be part of section 15 analysis. This ought to lead us to more critical thinking about the relevance of these piecemeal litigation victories (and losses) to larger, often conflicting, visions of how states should promote human flourishing.

To some, my comments and concerns may seem uninteresting. For many, it may not prompt concern that constitutional equality rights guarantees exist in states, like Canada, where material inequality has been rising for decades. Others might think it normal that equality rights guarantees exist in states, like Canada, where severe racial disparities are easily discerned in the operation of all aspects of criminal justice. But for those who see material inequality (by which I mean a growing gap in terms of wealth, and the presence of both extreme wealth and poverty) and rampant racial inequality (especially in criminal justice) as equality problems which a constitutional guarantee ought to somehow address, *Fraser* offers some food for thought. Within a tightly bound doctrinal context, it is a win for those who want a robust interpretation of constitutional equality guarantees. It confirms that adverse impacts can be used to illustrate equality violations. But set against the fuller context of Canadian section 15 litigation and a few crude measures of equality between Canadians, *Fraser* may seem a far more limited victory.

Painting *Fraser* as a major victory is myth creation. The myth, the vision on the horizon, tempts, lures, cements us into the belief that constitutional litigation can provide meaningful equality in this country. I do not think this is useful. At best, I hope that *Fraser* will serve to help sharpen discussions about what constitutional equality can or should accomplish in terms of social change, and about precisely what we mean when we claim to be "equality advocates."

32 For such arguments in the zone of international human rights, see e.g. Samuel Moyn, *Not Enough: Human Rights in an Unequal World* (Cambridge, Mass: Harvard University Press, 2018); Radha D'Souza, *What's wrong with rights? Social movements, law and liberal imaginations* (London, UK: Pluto Press, 2018).